

Green, LindaE

From: Laura Dumais <ldumais@earthjustice.org>
Sent: Friday, June 16, 2017 2:20 PM
To: FOIA HQ
Subject: Sierra Club - FOIA request re: ozone designation delay
Attachments: 2017.06.16_Ozone delay FOIA request_Sierra Club.pdf

Good afternoon,

Please find the attached request that I am submitting on behalf of my client, the Sierra Club. Please let me know if you have any questions. I will also attempt to upload this request to FOIAOnline.

Sincerely,
Laura Dumais
Associate Attorney
Earthjustice
1625 Massachusetts Avenue, N.W., Suite 702
Washington, DC 20036-2243
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June 16, 2017

Via Electronic Mail and FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2822T)
Washington, DC 20460
(202) 566-1667
E-mail: hq.foia@epa.gov

Re: Freedom of Information Act Request

To Whom It May Concern:

I write on behalf of the Sierra Club to request that the United States Environmental Protection Agency ("EPA") provide copies of the records described below pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 et seq., and the EPA regulations at 40 C.F.R. § 2.100, *et seq.*

The Sierra Club is a nonprofit organization founded in 1892 that has grown to include over 2.7 million members and supporters nationwide. The Sierra Club's goal is to promote the responsible use of the earth's ecosystems and educate humanity to protect and restore the environment. *See, e.g.,* <http://www.sierraclub.org/about>. Since the passage of the Clean Air Act, Sierra Club has worked to strengthen and fully implement its mission by providing essential services to its membership including education and dissemination of information, public representation, and litigation for full and effective implementation of the Clean Air Act's protections.

Records Requested and Definitions

EPA Administrator Scott Pruitt recently announced a one-year extension of the deadline for promulgating initial area designations under the 2015 ozone national ambient air quality standards ("2015 NAAQS"). *See* attached EPA press release and sample letter. The Sierra Club requests that EPA provide the records described below. Please note that "state" or "states" in the context of this request refers to the 50 states of the United States, the District of Columbia, Tribes, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

1. Any and all records in existence as of June 6, 2017 that EPA or Mr. Pruitt relied upon in purporting to authorize this extension. This includes all of the records upon which EPA or Mr. Pruitt relied and that contained information relevant to states' designations under the 2015 NAAQS (including submissions by states, exceptional event petitions, records generated by EPA or Mr. Pruitt, and any other relevant records), as well as any records listing or discussing the information EPA or Mr. Pruitt considered to be missing, incomplete, or otherwise necessary to complete the designations; and

2. For each of the states that submitted designation recommendations, for the time period starting on the date that the state submitted to EPA its recommendation for area designations under the 2015 NAAQS through June 6, 2017: any and all records of communications from EPA or Mr. Pruitt to state officials discussing or relating to area designations under the 2015 NAAQS. *You may exclude the letters Mr. Pruitt sent to the states on or around June 6, 2017 formally announcing his decision to extend EPA's deadline for promulgating initial area designations.*

For the purposes of this request, the terms "record" and "records" mean all materials in whatever form (handwritten, typed, electronic or otherwise produced, reproduced or stored) in EPA's possession as of June 6, 2017, including, but not limited to, letters, memoranda, correspondence, notes, applications, completed forms, studies, reports, reviews, guidance documents, policies, notes of telephone conversations, telefaxes, e-mails, text messages, internet chat logs, documents, databases, drawings, graphs, charts, photographs, minutes of meetings, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained. Without limitation, the records requested include records relating to the topics described above at any stage of development, whether proposed, draft, pending, interim, final, or otherwise. All of the foregoing are included in this request if they are in the possession of or otherwise under the control of the EPA or any of its offices nationwide, including responsive records in or on the personal computers, cellphones, or other devices, or personal email accounts used by any federal employee or official if used for any governmental purpose.

Exempt Records

If you regard any of the requested records to be exempt from required disclosure under FOIA, we request that you disclose them nevertheless, as such disclosure would serve the public interest of educating citizens and advancing the purposes of the Clean Air Act. Should you nonetheless invoke a FOIA exemption with regard to any of the requested records, please include in your full or partial denial letter sufficient information for the Sierra Club to appeal the denial. To comply with legal requirements, the following information must be included:

1. Basic factual material about each withheld item, including the originator, date, length, general subject matter, and location of each item; and
2. Explanations and justifications for denial, including the identification of the category within the governing statutory provision under which the document (or portion thereof) was withheld and a full explanation of how each exemption fits the withheld material.

If you determine that portions of a record requested are exempt from disclosure, please redact the exempt portions and provide the remainder of the record to the Sierra Club at the address listed below. If the requested documents do not exist, please indicate that in your written response.

Fee Waiver Request

The Sierra Club requests a waiver of all fees in connection with this FOIA request as provided by 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(l). FOIA carries a presumption of disclosure and Congress designed FOIA's fee waiver provision to allow nonprofit public interest groups—such as the Sierra Club—to access government documents without the payment of fees.

As explained below, this FOIA request satisfies the factors listed in EPA's governing regulations for waiver or reduction of fees, as well as the requirements of fee waiver under the FOIA statute – that “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii), *see also* 40 C.F.R. § 2.107(l)(1). Courts have stated that the statute “is to be liberally construed in favor of waivers for noncommercial requesters.” *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. S14298 (Sept. 30, 1986) (Sen. Leahy)).

1. The subject matter of the requested records must specifically concern identifiable “operations and activities of the government.”

Sierra Club's request clearly concerns the operations of the government because EPA is supposed to review information provided by the states about their proposed attainment and non-attainment designations under the Clean Air Act and then promulgate those designations. These actions, and the policies and procedures on which they are based, are unquestionably “identifiable operations or activities of the government.”

The Department of Justice Freedom of Information Act Guide expressly concedes that “in most cases records possessed by federal agency will meet this threshold” of identifiable operations or activities of the government. There can be no question that this is such a case.

2. The disclosure of the requested documents must have an informative value and be “likely to contribute to an understanding of Federal government operations or activities.”

The Freedom of Information Act Guide makes it clear that, in the Department of Justice's view, the “likely to contribute” determination hinges in substantial part on whether the requested documents provide information that is not already in the public domain. The requested records are “likely to contribute” to an understanding of EPA's decisions because they are not otherwise in the public domain and are not accessible other than through a FOIA request.

The information that the Sierra Club seeks will significantly contribute to the public's understanding of the considerations underlying EPA's actions that affect the crucially important designation process under the 2015 NAAQS for ozone. Further, the information sought will shed light on the materials EPA actually had available to it and its correspondence with states about that information. All this information will facilitate meaningful public participation and debate about this decision-making process, therefore fulfilling the requirement that the documents requested be “meaningfully informative” and “likely to contribute” to an understanding of the agency's decision-making process.

3. The disclosure must contribute to the understanding of the public at large, as opposed to the individual understanding of the requester or a narrow segment of interested persons. Under this factor, the identity and qualifications of the requester—i.e., expertise in the subject area of the request and ability and intention to disseminate the information to the public—is examined.

EPA itself has estimated that compliance with the ozone standard will save hundreds of lives, prevent 230,000 asthma attacks in children, and prevent 160,000 missed school days for children each year. However, the 2015 ozone standard will not be substantially and meaningfully implemented until EPA promulgates the designations. There is no question that the public at large has an interest in fully understanding the basis for EPA's decision to delay those promulgations and thus put their health at risk.

As described above, the Sierra Club has demonstrated involvement in clean air issues for decades. The Sierra Club also unquestionably has the "specialized knowledge" and "ability and intention" to broadly disseminate the information requested in a manner that contributes to the understanding of the "public-at-large." Sierra Club disseminates the information it receives through FOIA requests in a variety of ways, including, but not limited to: analysis and distribution to the media, distribution through publication and mailing, posting on the Club's website, emailing and list serve distribution to our members and supporters across the U.S., and via public meetings and events. Every year the Sierra Club website receives roughly 40,730 unique visits and 100,381 page views; on average, the site gets 104 visits per day. Sierra Magazine, which is a quarterly magazine published by the Sierra Club, has a circulation of approximately 1,000,000. *Sierra Club Insider*, an electronic newsletter, goes to over 850,000 people twice a month. In addition, Sierra Club disseminates information obtained by FOIA requests through comments to administrative agencies, and where necessary, through the judicial system.

Sierra Club's detailed description of its capacity and will to disseminate information gathered from the requested records demonstrates that disclosure of the records will contribute to public understanding. See *Judicial Watch v. Rossotti*, 326 F.3d 1309, 1314 (D.C. Cir. 2003) (requester demonstrates likelihood of contributing to public understanding of government operations and activities where it specifies multiple channels for disseminating information and estimated viewership numbers).

Furthermore, the public has a strong financial interest in seeing that EPA spends tax dollars effectively, in furtherance of its mission, and in compliance with federal environmental law. All taxpayers contribute funding for the agency's activities and have an interest in the agency's handling of resources. If EPA already possesses the information necessary to make designations but is incurring taxpayer expenses seeking unnecessary information, the public at large has an interest in understanding its actions.

4. The disclosure must contribute “significantly” to public understanding of government operations or activities. The public’s understanding must be likely to be enhanced by the disclosure to a significant extent.

There is currently little or no information publicly available regarding Mr. Pruitt’s decision to delay area designations under the 2015 NAAQS. Absent disclosure of the records requested, the public lacks any understanding of why the EPA Administrator would choose to pursue a course of action that will inflict serious harms – harms that EPA itself has quantified – on so many Americans and their communities

As explained above, the records requested will contribute to the public understanding of the EPA’s and Mr. Pruitt’s role in this process, and on EPA’s “operations and activities” associated with this critically important information.

5. Whether the requester has a commercial interest that would be furthered by the requested disclosure.

The Sierra Club has no commercial interest in the requested records. Nor does the Sierra Club have any intention to use these records in any manner that “furthers a commercial, trade, or profit interest” as those terms are commonly understood. The Sierra Club is a tax-exempt organization under section 501(c)(4) of the Internal Revenue Code, and as such has no commercial interest. The requested records will be used for the furtherance of Sierra Club’s mission to inform the public on matters of vital importance to the environment and public health.

* * *

We respectfully request, because the public will be the primary beneficiary of this requested information, that EPA waive processing and copying fees pursuant to 5 U.S.C. § 552(a)(4)(A). In the event that your agency denies a fee waiver, please send a written explanation for the denial. If you deny our request for a fee waiver, please provide an estimate of all charges for supplying the records I have requested in advance and allow me to respond to the estimate before proceeding with fulfilling the request.

Record Delivery

We prefer to receive the records in **searchable and analyzable electronic format wherever possible**. We request that EPA comply with all relevant deadlines and other obligations set forth in FOIA and the agency’s regulations. 5 U.S.C. § 552, (a)(6)(A)(i); 40 C.F.R. § 2.104. This includes the requirement that a response to this request must be made within 20 working days of your receipt of this letter.

Please mail or email copies of all requested records as soon as possible to me at the address in my signature block below. **Please produce them on a rolling basis**; at no point should the search for—or deliberation concerning—certain records delay the production of others that the agency has already retrieved and elected to produce. If EPA concludes that any of the records requested here are publicly available, please let me know.

Thank you for your cooperation. If you find that this request is unclear in any way please do not hesitate to contact me to see if I can clarify the request or otherwise expedite and simplify your efforts to comply.

Sincerely,

/s/Laura Dumais

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Green, LindaE

From: Laura Dumais <ldumais@earthjustice.org>
Sent: Friday, June 16, 2017 2:30 PM
To: FOIA HQ
Subject: RE: Sierra Club - FOIA request re: ozone designation delay
Attachments: Pruitt letter _AZ-Ducey_6-6-17.pdf, Press release _EPA-extend-deadline-2015-ozone.pdf

Here are the two attachments referenced in the letter I just sent. My apologies for not including them in the same email message as the FOIA request!

Laura Dumais
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E. SCOTT PRUITT
ADMINISTRATOR

June 6, 2017

The Honorable Doug Ducey
Governor of Arizona
State Capitol
1700 W. Washington Street
Phoenix, AZ 85007

Dear Governor Ducey:

I am writing to update you on the status of the U.S. Environmental Protection Agency's efforts related to the National Ambient Air Quality Standards (NAAQS) for ozone promulgated in October 2015. Pursuant to section 107(d)(1)(B) of the Clean Air Act (CAA), I am extending the deadline for promulgating initial area designations for the 2015 ozone NAAQS by one year. I have determined that there is insufficient information, and taking additional time is appropriate in order to consider completely all designation recommendations provided by state governors pursuant to CAA section 107(d)(1)(A) and to rely fully on the most recent air quality data. This additional time will also provide the Agency time to complete its review of the 2015 ozone NAAQS, prior to taking this initial implementation step.

Although the new ozone standard was set on October 1, 2015, there remains a host of complex issues that could undermine associated compliance efforts by states, localities and regulated entities. As part of the review process, the Agency is evaluating these issues primarily focusing on: fully understanding the role of background ozone levels; appropriately accounting for international transport; and, timely consideration of exceptional events demonstrations. Additionally, pursuant to language in the recently-enacted FY 2017 omnibus bill, I have established an Ozone Cooperative Compliance Task Force to develop additional flexibilities for states to comply with the ozone standard.

States have made tremendous progress and significant investment cleaning up the air. Since 1980, total emissions of the six principal air pollutants have dropped by 63 percent and ozone levels have declined by 33 percent. Despite the continued improvement of air quality, costs associated with compliance of the ozone NAAQS have significantly increased. I am committed to working with you and your local officials to effectively implement the ozone standard in a manner that is supportive of your air quality improvement efforts, without interfering with local decisions or impeding economic growth.



I appreciate the information you and your staff have shared with EPA already as part of this process. I am confident this progress will continue as we work together towards our shared goal of clean air, a robust economy and stronger, healthier communities. If you have questions or concerns, please contact me or your staff may contact Troy Lyons, Associate Administrator for the Office of Congressional and Intergovernmental Relations, at lyons.troy@epa.gov or (202) 564-4987.

Respectfully yours,



E. Scott Pruitt



News Releases from Headquarters

EPA to Extend Deadline for 2015 Ozone NAAQS Area Designations

06/06/2017

Contact Information:

U.S. EPA Office of Media Relations (press@epa.gov)

WASHINGTON – U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt sent a letter to governors today to inform them of EPA's efforts related to the National Ambient Air Quality Standards (NAAQS) for ozone promulgated in October 2015. EPA is extending the deadline for promulgating initial area designations, by one year, for the 2015 ozone NAAQS.

"States have made tremendous progress and significant investment cleaning up the air. We will continue to work with states to ensure they are on a path to compliance," said **Administrator Scott Pruitt**.

The National Ambient Air Quality Standard (NAAQS) for ground-level ozone is an outdoor air regulation under the Clean Air Act. As part of the process to determine what areas of the country are able to meet the current air quality standards, states are currently submitting their proposals for area designations under the 70 parts per billion (ppb) standard, which was lowered from 75 ppb in 2015. Areas designated as being in "nonattainment" of the standard face consequences, including: increased regulatory burdens, restrictions on infrastructure investment, and increased costs to businesses.

EPA is giving states more time to develop air quality plans and EPA is looking at providing greater flexibility to states as they develop their plans. And, pursuant to the language in the recently-enacted FY2017 Omnibus funding bill, Administrator Pruitt is establishing an Ozone Cooperative Compliance Task Force to develop additional flexibilities for states to comply with the ozone standard.

Additionally, the Agency is taking time to better understand some lingering, complicated issues so that air attainment decisions can be based on the latest and greatest information. This additional time will also provide the agency time to review the 2015 ozone NAAQS, prior to taking this initial implementation step.

Although the new ozone standard was set on October 1, 2015, there remains a host of complex issues that could undermine associated compliance efforts by states and localities. The Agency is evaluating these issues, primarily focused on:

- Fully understanding the role of background ozone levels;
- Appropriately accounting for international transport,
- And, timely consideration of exceptional events demonstrations.

“We share the goal of clean air, a robust economy and stronger, healthier communities. We are committed to working with states and local officials to effectively implement the ozone standard in a manner that is supportive of air quality improvement efforts without interfering with local decisions or impeding economic growth,” **said Administrator Pruitt.**

Since 1980, total emissions of the six principal air pollutants have dropped by 63 percent and ozone levels have declined by 33 percent. Despite the continued improvement of air quality, costs associated with compliance of the ozone NAAQS have significantly increased.

Read the letter sent to governors: <https://www.epa.gov/ozone-designations/administrator-extends-deadline-area-designations-2015-ozone-standards>

Visit ozone designations page: <https://www.epa.gov/ozone-designations>

R107

LAST UPDATED ON JUNE 7, 2017